1996

State of Utah v. Lisa Deherrera : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
v.	)	
RAYMOND DEHERRERA,	)	Case No. 960300-CA Priority No. 2
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Burglary, in violation of Utah Code Annotated § 76-6-202 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated § 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief:

Utah Code Ann. § 76-6-202

U.S. Constitutional Amendment VI

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Whether trial counsel was ineffective in his trial

preparation, investigation and failure to call an expert witness to espouse his theory of the case?

"Claims of ineffective assistance of counsel involve a mixed question of law and fact. Thus, 'where a trial court has previously heard a motion based on ineffective assistance of counsel, reviewing courts are free to make an independent determination of a trial court's conclusions.' However, the findings of fact will not be set aside unless clearly erroneous." Fernandez v. Cook, 870 P.2d 870, 872 (Utah 1993); State v. Templin, 805 P.2d 182, 186 (Utah 1990).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for one count of burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, presiding. On January 16, 1996, a jury found the defendant guilty of one count of burglary.

On March 29, 1996, the trial court sentenced the defendant to one to fifteen years in the Utah State Prison for the burglary conviction. After the sentencing the defendant filed a notice of appeal. Pursuant to that appeal counsel for the defendant filed, on December 4, 1996, a motion to remand for determination of ineffective assistance of counsel. On January 10, 1997, this

Court granted the remand and ordered the case remanded to the District Court for an evidentiary hearing. On March 24, 1997, an evidentiary hearing was held before Judge Frederick in the Third District Court. Following that remand the defendant's appeal is now before this Court.

STATEMENT OF FACTS

It was alleged at trial that the appellant was inside the house of Kenneth Struhs, when he was shot in the leg by Mr. Struhs. (Tr. 1/16/96 at 37-68). In the opening statement made by trial counsel it is clear that the theory of the case as stated by appellant's trial counsel was that the appellant was not in Mr. Struhs house when he was shot, but was there with an acquaintance and was unaware of the fact that the acquaintance was breaking into the house until it was too late. (Tr. 1/16/96 at 30-37).

In accordance with trial counsel's theory of the case, and the appellant's explanation for his presence outside Mr. Struhs residence, the family of the appellant and the appellant alleges that trial counsel requested and obtained money from them to hire an expert. (Tr. 3/24/97 at 9, 16, 18-19). However, no such expert was ever obtained. In fact, trial counsel did not call any witnesses at the one day trial. Instead, he testified that he was relying on cross-examination techniques to represent the

appellant.

During the trial, appellant's trial counsel attempted to cross-examine Mr. Struhs on the fact that the appellant was shot in the back of the leg and not the front. (Tr. 1/16/96 at 66-67). This fact was crucial to his theory of the case. However, as he attempted to ask questions regarding the entry location of the wound he was stopped by the court because there was no expert testimony to support his claim. (Tr. 1/16/96 at 67). However, at the Rule 23B hearing on remand the appellant's trial counsel testified that he wanted an expert but that he did not have the resources. (Tr. 3/24/97 at 57). However, appellant's trial counsel could not even testify that he contacted any expert witnesses in this case. (Tr. 3/24/97 at 59). Although, he did testify that it would have been "perhaps effective to have an expert witness if we knew and if we'd been able to get a hold of that expert witness at a time we were going to feel very confident what he was going to testify to..." (Tr. 3/24/97 at 63).

At the rule 23B hearing the court accepted as a proffer the fact that the defendant was outside of the home at the time of the shooting. (Tr. 3/24/97 at 6). He accepted as a proffer the fact that the defendant never entered the home. (Tr. 3/24/97 at 7). The court also accepted as a proffer the fact that the defendant was turning to his right, away from the shooter, when

he was shot from the back of the leg. (Tr. 3/24/97 at 11).

Furthermore, at the hearing on remand an expert testified that the key trial witness Mr. Struhs' trial testimony would have been shown to be inconsistent and unbelievable had he, as an expert, testified at trial. (Tr. 3/24/97 at 37-41).

Appellant's trial counsel's vision is seriously impaired. The record is replete with the fact that trial counsel's vision was impaired. (Tr. 1/16/96 at 30, 78 and tr. 3/15/96 at 2-3). At the hearing on remand the appellant's trial counsel testified that he was legally blind in one eye and just barely above legally blind in the other eye. (Tr. 3/24/97 at 47-48). He testified that he could only see photographs if they were a couple of inches away from him. (Tr. 3/24/97 at 50). He also testified that he cannot see anybody distinctly. (Tr. 3/24/97 at 49).

SUMMARY OF THE ARGUMENT

The attorney hired to represent the appellant at trial was deficient in his performance. Having failed to adequately investigate the case and call a material expert witness to support his theory of the case, the appellant's trial counsel was ineffective. Counsel was given money to obtain an expert and did not contact any expert about the case. Had counsel called an expert to support his theory of the case there is a reasonable

probability of a different result. Also, trial counsel's eyesight was so bad that it prohibited effective representation.

ARGUMENT

I. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO CALL AN EXPERT WITNESS.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court, analyzing the Sixth Amendment to the United States Constitution,[1] set out a two-prong test for determining claims of ineffective assistance of counsel. The court stated:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

In deciding an ineffective assistance of counsel claim, the court must evaluate the reasonableness of counsel's actions at the time of the alleged error and in light of all the circumstances. Id. at 689. A court must make "every effort . .

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[1]This Sixth Amendment to the United States Constitution states that "in all criminal prosecutions," the accused shall have the "assistance of counsel for his defense." United States Constitution Amendment VI.

. to eliminate the distorting effects of hindsight." Id. An evaluating court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action might be considered sound trial strategy." United States v. Taylor, 832 F.2d 1187, 1194 (10th Cir. 1987)(quoting Strickland, 466 U.S. at 689).

In State v. Templin, 805 P.2d 182 (Utah 1990), the Utah Supreme Court was confronted with a similar issue as the present case. In Templin, the defendant was convicted by a jury of rape and aggravated sexual assault. The defendant claimed that his trial counsel was ineffective in failing to contact several prospective witnesses. The Utah Supreme Court following Strickland stated:

> If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance **cannot** fall within the 'wide range of reasonable professional assistance.' This is because a decision not to investigate cannot be considered a tactical decision. It is only after adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons. Therefore, because defendant's trial counsel did not make a reasonable investigation into the possibility of procuring prospective defense witnesses, the first part of the Strickland test has been met.

State v. Templin, 805 P.2d at 188 (emphasis added, citations omitted).

A similar situation exists here. The defendant's trial counsel did not adequately investigate this case, nor did he prepare adequately for trial. It was clear that trial counsel's theory of the case was that the appellant did not enter the residence. However, his only preparation was to believe that he could obtain the information he needed through adequate cross-examination. (Tr. 3/24/97 at 59). He stated that **he** could not afford to contact an expert witness. He stated that he did not have the money.[2] (Tr. 3/24/97 at 60). Although, he admitted that he would have preferred to have had an expert. (Tr. 3/24/97 at 60, 63). It is clear that the appellant has met the first prong of the Strickland test and shown deficient performance.

In Templin, the court considered the second prong of the test as follows:

> This testimony (of a witness not called) is important for the reason that it reflects upon the credibility of [the victim], because [the] testimony, although not completely consistent with [defendant's] testimony, contradicts several aspects of [victim's] testimony. This is important in the instant

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[2]Counsel's argument that **he** could not afford an expert witness and therefore he did not contact any experts, flies in the face of established minimum standards for indigent defendants. See Utah Code Ann. § 77-32-1(3)(the state is to provide investigatory and other facilities necessary for a complete defense). If the appellant truly could not afford an expert it was counsel's responsibility to call this to the attention of the trial judge and proceed in a manner whereby the state would pay for the expert.

> case because [victim's] testimony is the only direct evident of [defendant's] guilt. In reviewing this testimony, it is important to note that because it affects the credibility of the only witness who gave direct evidence of defendant's guilt, the testimony affects the 'entire evidentiary picture.' . . . An appellate court cannot discern the exact effect such testimony would have hade on the jury's judgment concerning the credibility of [defendant] and [victim]. The testimony, however, is of sufficient import that we feel there is a reasonable probability that if these witnesses had been called at trial, the outcome of the trial would have been different. Since both parts of the Strickland, test have been met, we hold that [defendant] was denied his constitutional right to effective assistance of counsel.

Templin, at 188-89.

The situation in the present case is similar. The prosecution's case rested on the testimony of Kenneth Struhs. His testimony was the direct evidence of the appellant's entry into the residence. For the appellant to be convicted the jury had to have believed that he entered the residence and was in the house when he was shot. See Utah Code Ann. § 76-6-202 (which states that to be guilty of burglary a person must "enter or remain unlawfully in a building"). The appellant's trial counsel's theory of the case was the fact that the appellant did not go in the residence and in fact was shot in the back of the leg and not the front, while he was outside of the

dwelling.[3] Trial counsel's failure to contact an expert and call one at trial in support of that theory was ineffective assistance of counsel. Furthermore, the appellant was prejudiced by trial counsel's inaction resulting in a conviction that would not have been possible had an expert testified to the inconsistencies as testified to at the hearing on remand. See Tr. 3/24/97 at 37-41. Thus, but for trial counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different. State v. Smith, 909 P.2d 236, 243 (Utah 1995).

II. TRIAL COUNSEL'S EYESIGHT PROHIBITED HIM FROM EFFECTIVELY REPRESENTING THE APPELLANT.

Appellant's trial counsel's vision is seriously impaired. The record is replete with the fact that trial counsel's vision is impaired. (Tr. 1/16/96 at 30, 78 and tr. 3/15/96 at 2-3). At the trial, exhibits in the form of diagrams and photographs were submitted by the state and it is clear from the record that appellant's trial counsel could not adequately view these diagrams and photos. This fact supports ineffective assistance of counsel in and of itself as counsel was ineffective in his ability to represent the appellant. The prejudice from this factor is self evident an attorney whose eyesight is impaired

[3]The appellant has been prejudiced by the fact that had a jury heard testimony to support the claim that the appellant was never in the house, the most he could have been convicted of would have been an attempted burglary, a third degree felony.

cannot, alone, effectively represent a defendant in a trial.

CONCLUSION

For the foregoing reasons the appellant respectfully requests that this Court reverse the appellant's conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED this 24th day of September, 1997.

BENJAMIN A. HAMILTON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Benjamin A. Hamilton, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah, 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 24th day of September, 1997.

BENJAMIN A. HAMILTON

PURSUANT TO RULE 24(a)(11) OF THE
UTAH RULES OF APPELLATE PROCEDURE
NO ADDENDUM IS NECESSARY